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No. 00-630

Supreme Court, U.S.
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In The

Supreme Court of the United States

EUGENE TELFAIR,

Petitioner,

v.

FIRST UNION MORTGAGE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Are attorneys' fees incurred post-confirmation by an oversecured homestead lender in a Chapter 13 bankruptcy proceeding subject to the operation of 11 U.S.C. § 506(b)?

2. Did the three lower courts err in any respect in holding that, under Georgia law, First Union is not in a fiduciary relationship with Petitioner?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent, First Union Mortgage Corporation states that it is a wholly owned subsidiary of First Union Corporation, a publicly held company with shares traded on the New York Stock Exchange.

All parties to the appeal in the Eleventh Circuit are listed in the caption of the Petition.

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COUNTER-STATEMENT OF THE CASE

In June of 1984, the Petitioner and his wife obtained a VA-guaranteed mortgage loan from Cameron-Brown Company (a First Union Mortgage Corporation predecessor) in the original principal amount of $37,900.00. As security for the loan, Petitioner executed a VA form Security Deed dated June 8, 1984. One provision of the Security Deed required the Petitioner to maintain adequate hazard insurance on the premises in order to protect the lender's collateral.

In 1987, Petitioner's hazard insurance carrier gave notice that the existing insurance policy would not be renewed at the expiration of the policy year. On at least two separate occasions, First Union notified Petitioner in writing that he would be required to obtain alternate replacement insurance for the lapsed policy. When Petitioner nonetheless failed to obtain replacement insurance for the property, First Union "force placed" the insurance coverage, as it was entitled to do under the loan documents, in order to keep the property insured. The coverage obtained in 1988 was placed through a master insurance contract First Union had with Transamerica Premier Insurance Company.

The new policy premium was advanced by First Union and later debited from Petitioner's escrow account. First Union was authorized by the Security Deed and VA guidelines[1] to pay the premium in this fashion. Additionally, Petitioner endorsed over to First Union a check from his prior insurer, reflecting a rebate of the paid but

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[1] *See* 38 C.F.R. 36.4326.

unearned premium that was being refunded in conjunction with the nonrenewal of the policy. The cover letter for the check stated it would be used to "replenish the funds in your escrow account" that had been disbursed for the force placed insurance.

Force placed hazard coverage is very different from a traditional homeowner insurance policy. The premiums are generally two to four times higher because the carrier is prevented from conducting any objective underwriting on the insured risk. Instead, the carrier agrees to accept any and all properties submitted by the mortgage servicer for coverage, no questions asked, based upon the amount of coverage requested by the servicer. Furthermore, from an actuarial perspective, the types of properties that are submitted for force placed coverage historically constitute a higher risk pool than other residential properties. Based upon the increased loss experience and the lack of objective underwriting, the insurance companies that write force placed coverage receive approval from the various state insurance regulators for premium rate structures in excess of that which is available for standard homeowner policies.

In Petitioner's case, his annual insurance premium increased from approximately $300 to $502 after his default caused the coverage to be force placed. Petitioner acknowledged notification of this increase in premium, but still took no steps to obtain his own replacement coverage until 1998 – *ten years* after the initial lapse. During each year following the initial force placement of Petitioner's hazard insurance coverage, he was sent an annual renewal notice, approximately 60 days prior to the anniversary date of the policy, advising him again of his

obligation to obtain hazard insurance coverage. In recent years, this notice also advised Petitioner (in all-capital letters) that force placed insurance costs much more and may be less comprehensive in coverage than a standard homeowner policy, and that a First Union insurance agency affiliate would receive an agency commission. Additionally, on each anniversary date, the force placed insurance carrier issued a declaration sheet showing the amount of coverage and the premium, which was mailed directly to Petitioner.

Apart from the force placed insurance issue, in 1988 Petitioner began what would later become a chronic pattern of late payments and payment defaults. For example, in August of 1988, he was forced to cure a 6-month arrearage in payments in order to avoid foreclosure. By 1992, he was again several months in arrears, precipitating his filing of bankruptcy at the end of that year.

In his Chapter 13 Plan, confirmed on May 3, 1993, Petitioner proposed to cure his pre-petition mortgage arrearage with First Union through regular monthly payments to the Chapter 13 Trustee. First Union timely filed a proof of claim prior to confirmation, which was accepted and allowed by the Bankruptcy Court. This proof of claim established First Union's status as an oversecured homestead mortgage lender. Under the terms of Petitioner's Chapter 13 Plan, he was required to remain current in his regular post-petition payments to First Union in addition to his Plan payments to the Trustee. However, Petitioner did neither.

First, the Petitioner became delinquent in several payments to the Trustee during the pendency of the

Chapter 13 Plan, causing the Trustee to file two separate motions to dismiss for that reason. At the same time, he also defaulted on several post-petition payments to First Union. These payment defaults resulted in the filing of three motions to lift stay by First Union, all well after confirmation. The first two motions were voluntarily withdrawn to permit tracing of certain alleged payments. Following the filing of a third motion to lift stay, there remained two money orders allegedly tendered by Petitioner which could not be located through the research efforts of First Union. On September 16, 1996, the Bankruptcy Court issued a Consent Order which identified these two money orders, and specified a ninety (90) day period to allow the debtor to trace the funds through the issuer of the money orders. According to the terms of the Order, if the payments could not be successfully traced within that time frame, the debtor was to replace them. However, Petitioner did not undertake any tracing efforts whatsoever. Nor did he thereafter replace the two missing payments. Thus, by early 1997, the post-petition payment defaults related to the Petitioner's mortgage loan remained uncured, and were compounded by additional subsequent payment defaults.

On April 9, 1997, the Trustee reported that the Plan had been completed and all creditors had been fully paid. A discharge was then granted to Petitioner by the Bankruptcy Court on April 23, 1997. Thereafter, on May 8, 1997, First Union's attorneys' fee and filing fee related to the third motion to lift stay were assessed against the

Petitioner's loan account.[2] Only $410.00 of First Union's total legal fees of $1,170.00, all related to Petitioner's post-confirmation payment defaults, were ever charged back to Petitioner's account. Due to the several uncured post-petition payment defaults, foreclosure proceedings were then initiated against Petitioner's property. Those proceedings were suspended by the filing of Petitioner's Complaint on September 23, 1997.

REASONS FOR DENYING THE WRIT

Certiorari review of the decision of the U.S. Court of Appeals for the Eleventh Circuit should be denied because this civil action does not present any issues of law which are worthy of this Court's review. The two issues for which Petitioner seeks this Court's review rest on an imagined split among the Circuit Courts of Appeal which does not exist, and an argument which was never raised in the trial court.

Certiorari review is not warranted because the claims Petitioner advanced in the lower courts were resolved based upon this Court's decision in *Rake v. Wade*, 508 U.S. 464 (1993) and the common law of the State of Georgia.

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[2] Petitioner incorrectly asserts that First Union satisfied the disputed fee from payments made by the Trustee under the Chapter 13 plan. In fact, *all* of the Trustee payments were properly applied by First Union to cure the pre-petition arrearage. The attorney fee debit at issue did not take place until *after* the Trustee's final report and the entry of a discharge by the Bankruptcy Court.

The Complaint in this case, brought by Petitioner individually and on behalf of a putative class of persons similarly situated, set forth two counts against Respondent, First Union Mortgage Corporation. In the first count, Petitioner claimed that First Union's assessment of post-confirmation attorney's fees against his loan account without an express order from the Bankruptcy Court violated 11 U.S.C. § 506(b). The second count presented a Georgia common law claim for breach of fiduciary duty. The Bankruptcy Court granted summary judgment to First Union on both claims.

The Bankruptcy Court's decision on the first count was based upon a straightforward application of the decision in *Rake v. Wade*, 508 U.S. 464 (1993). In *Rake*, this Court held that § 506(b) applies in a Chapter 13 bankruptcy only from the petition date until the date of confirmation. *Id.* at 468 ("§ 506(b) applies only from the date of filing through the confirmation date"). Since it was undisputed below that the attorney's fees at issue accrued *after* the confirmation of Petitioner's Chapter 13 plan, First Union did not violate 11 U.S.C. § 506(b).

With regard to the second count, Petitioner asserted his claim for breach of fiduciary duty under Georgia law. On appeal in the courts below, and again before this Court, Petitioner seeks to recast this claim as a violation of the federal Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609. This argument was neither raised in nor decided by the Bankruptcy Court and, in any event, is not the basis upon which the lower courts' judgments rest. The lower courts correctly found that the Security Deed and mortgage loan documents do not, as a matter of law, create any fiduciary duty, and summary

judgment against Petitioner was properly granted on this claim.

1. After the Confirmation of a Chapter 13 Bankruptcy Plan, an Oversecured Homestead Mortgage Lender's Assessment of Attorney's Fees is Not Subject to 11 U.S.C. § 506(b).

The first count in Petitioner's Complaint asserted a violation of 11 U.S.C. § 506(b).[3] The claim was resolved in the lower courts by reference to the opinion in *Rake v. Wade*, 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993). In *Rake*, this Court held that § 506(b) only establishes the amount of an allowed pre-confirmation secured claim, to the extent provided for under the applicable note and security agreement:

> Under § 506(b) the holder of an oversecured claim is allowed interest on his claim to the extent of the value of the collateral. Section 506(b) "directs that postpetition interest be paid on *all* oversecured claims," *Ron Pair*, 489 U.S. at 245 (emphasis added), and, as the parties acknowledge, *such interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan*. . . . Under the

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[3] 11 U.S.C. § 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

> unqualified terms of § 506(b), therefore, respondent is entitled to *preconfirmation* interest on these arrearages. Where the statutory language is clear, our " 'sole function . . . is to enforce it according to its terms.' " *Ron Pair, supra,* at 241 (quoting *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L. Ed. 442, (1917)). *Accord, Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L. Ed. 2d 391 (1992).
>
> Section 1322(b)(5), on the other hand, states that a Chapter 13 plan may "provide for the curing of any default and the maintenance of payments" on certain claims. While § 1322(b)(5) authorizes a Chapter 13 plan to provide for payments on arrearages to effectuate a cure after the effective date of the plan, nothing in that provision dictates the terms of the cure. In particular, § 1322(b)(5) provides no indication that the allowed amount of the arrearages cured under the plan may not include interest otherwise available as part of the oversecured claim under § 506(b). . . . Construing §§ 506(b) and 1322(b)(5) together, and giving effect to both, we conclude that § 1322(b)(5) authorizes a debtor to cure a default on a home mortgage by making payments on arrearages under a Chapter 13 plan, and that where the mortgagee's claim is oversecured, § 506(b) entitles the mortgagee to *preconfirmation* interest on such arrearages.

Rake v. Wade, 508 U.S. 464, 471-72 (1993) (citations omitted, emphasis added). Thus, the Bankruptcy Court correctly held that § 506(b) had no application to the disputed post-confirmation attorney's fees and expenses in this case.

2. There Is No Split Among the Courts of Appeal as to What Constitutes Post-Confirmation Property of a Chapter 13 Estate.

Although not separately advanced as an independent claim for relief, the lower courts nonetheless addressed Petitioner's argument that First Union's post-confirmation assessment of an attorney's fee, pursuant to the terms of the mortgage loan documents, violated the automatic stay of 11 U.S.C. § 362(a). The Bankruptcy Court concluded that the assessment of fees was proper under the mortgage loan documents, and did not impact or affect the Petitioner's ability to make his Chapter 13 Plan payments to the Trustee. Only the sums necessary to make those Plan payments constituted property of the bankruptcy estate after confirmation.

The only two Circuit Courts of Appeal to squarely address the issue of what constitutes post-confirmation property of the estate in a Chapter 13 proceeding have both adopted the so-called estate transformation approach. *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333 (11th Cir. 2000); *In re Heath*, 115 F.3d 521 (7th Cir. 1997). The resolution of this legal issue involves a reconciliation of the language found in 11 U.S.C. § 1306(a) and § 1327(b), as those provisions relate to the automatic stay of § 362. Under the estate transformation approach, property of the estate following confirmation includes only that property which is necessary to fund the debtor's Chapter 13 plan. All other property revests in the debtor at confirmation. In this case, the Eleventh Circuit reasoned that the estate transformation approach "protects the interests of both the debtor and the creditors." *Telfair*, 216 F.3d at 1340 (A-11). The court further explained:

> We therefore echo the conclusion of the Seventh Circuit and "read the two sections, 1306(a)(2) and 1327(b), to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan." *In re Heath*, 115 F.3d at 524. In this case, after confirmation, only the amount required for the plan payments remained property of the estate.

Id.

Contrary to the Petitioner's claim, the Eighth Circuit has not adopted a different approach. In *Security Bank of Marshalltown, Iowa v. Neiman*, 1 F.3d 687 (8th Cir. 1993), the court held only that a Chapter 13 estate continues to exist after confirmation, without specifically addressing what property is included in that estate. Indeed, the opinion itself makes this distinction by reference to a Utah bankruptcy court decision:

> *In re Adams*, 12 B.R. 540 (Bankr. D. Utah 1981), presumed the Chapter 13 estate survived after confirmation, and the only issue was what the estate included and what was protected by the stay. *That is not the issue in the present case* – we must determine if an estate exists post-confirmation.

Id. at 690 (citation and emphasis added). In short, because the Eighth Circuit expressly sidestepped the issue of what constitutes property of the estate, it cannot be said to have decided the matter contrary to the Seventh and Eleventh Circuits.

Moreover, the facts and issues before the court in *Neiman* were distinctly different from those addressed in this and the *Heath* cases. In *Neiman*, the debtors incurred business debts after confirmation of their Chapter 13 plan, and subsequently converted their bankruptcy to a Chapter 7 proceeding. The issue addressed by the *Neiman* court was whether any Chapter 13 estate exists after confirmation to validate the Trustee's priority award of administrative expenses for preservation of the estate. The court held that the bankruptcy estate continues to exist after confirmation so that priority treatment of post-confirmation administrative expense was in order. *Id.* at 691. In short, there is no split among the Circuit Courts of Appeal as to what constitutes post-confirmation property of a Chapter 13 estate.

3. Under Georgia Law, There is No Fiduciary Duty Running from First Union to the Petitioner.

Petitioner's claim for breach of fiduciary duty was based on the legal theory that the mortgage loan documents created an express or implied trust between him, as borrower, and First Union, as a mortgage loan servicer. According to Petitioner, First Union was prohibited under Georgia law from taking any action that was not in Petitioner's best interest. This breach of fiduciary duty claim was found wanting because, under Georgia law, the circumstances here did not evidence the creation of an express or implied trust between the parties. Instead, the lower courts found an ordinary debtor-creditor relationship.

As to Petitioner's argument that a common law trust was created by virtue of the escrow account provided for in the mortgage loan documents, the lower courts relied upon federal cases interpreting similar VA mortgage loan documents as well as Georgia cases concerning express and implied trusts. *See, e.g., Judd v. First Fed. Sav. & Loan Ass'n of Indianapolis*, 710 F.2d 1237, 1241 (7th Cir. 1983) ("despite the scattered use of the words 'trust' and 'trustee' and the phrase 'in trust' the mortgages do not transform a traditional debtor-creditor relationship into a fiduciary relationship"); *Moore v. Bank of Fitzgerald*, 225 Ga. App. 122, 126, 483 S.E.2d 135, 139 (1997); *Knight v. First Fed. Sav. & Loan Ass'n*, 151 Ga. App. 447, 260 S.E.2d 511, 515 (1979). Upon review of these authorities, the Eleventh Circuit properly held that neither an express nor an implied trust was created:

> As correctly found by the bankruptcy and district courts, there is no evidence that either type of trust was formed because there is no indication that [Petitioner] and First Union intended the escrow funds to comprise a trust corpus. Rather, First Union's retention of future tax and insurance payments inured to the benefit of both parties in protecting the secured property.

Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1341 (11th Cir. 2000) (A-13).

The Eleventh Circuit did not address the RESPA argument now advanced before this Court because it was not raised in the Bankruptcy Court below. This Court has long held that it "will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987);

Hormel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). The Circuit and District Courts below expressly found that this RESPA allegation was not raised or litigated in the trial court. "These [RESPA] arguments were not timely raised before the bankruptcy court, and we decline to hear them for the first time in this appeal." *Telfair*, 216 F.3d at 1337 n. 6 (A-4). "In addition to the instances already mentioned in this Order, [Petitioner] has proffered several arguments which the Court mentions now only to highlight that these matters were not considered because they were not raised in the Bankruptcy Court below. . . . Other than a passing reference to RESPA in the class certification hearing, the Court found no reference to these issues below." *Telfair v. First Union Mortgage Corp.*, Civil Action No. CV-198-193 (S.D. Ga., April 19, 1999) (unpublished) (A-55). Because the RESPA argument was not raised or litigated in the trial court, it is not a proper subject for certiorari review.

CONCLUSION

There being no basis upon which to grant certiorari review of the decision of the Eleventh Circuit, the Petition for Writ of Certiorari herein should be denied.

November 20, 2000

Respectfully submitted,

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